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Taxpayer wins U.K. Privy Council CARICOM Tax Treaty case

APRIL 28, 2025 12 MIN READ

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In this Update:

- On April 22, 2025, the U.K. Privy Council released its decision in *Methanex* regarding the application of the CARICOM Tax Treaty to dividends paid within a multinational corporate group, and entitlement to benefits under that treaty.
- The Privy Council overturned the Trinidad & Tobago Court of Appeal, which had concluded that dividends paid by a Trinidadian company to its sole shareholder in Barbados could be "disregarded" and attributed to the ultimate Canadian parent company of the multinational group on the basis that the dividends were "artificial and fictitious" within the meaning of a domestic rule in the *Income Tax Act* (Trinidad & Tobago). The Privy Council held that the dividends were neither artificial (abnormal) nor fictitious (a sham), as the dividends were the only legal means to distribute profits up the corporate chain, and it was commercially commonplace for national and international groups to distribute profits precisely as was done in this case.
- The Privy Council also confirmed that the Barbados shareholder in this case, an "International Business Company" under the laws of Barbados, was "liable to tax" in Barbados and therefore properly resident in Barbados for purposes of the CARICOM Tax Treaty. In so doing, the Privy Council affirmed the decisions of the Supreme Court of Canada in *Crown Forest* and *Alta Energy*, which had clarified the meaning of the "liable to tax" test for residence under international tax treaties.

On April 22, 2025, the U.K. Privy Council delivered a landmark decision in the appeal of *Methanex Trinidad (Titan) v. The Board of Inland Revenue*. The Privy Council ruling in favour of the taxpayer overturned earlier decisions of the Tax Appeal Board and the Court of Appeal of Trinidad & Tobago. The Privy Council's ruling clarifies several important principles in international tax law, including the test for residency under tax treaties, the proper role of corporate and commercial law and the interpretation of domestic anti-avoidance rules.

The case concerned dividends paid by a Trinidadian company to its sole shareholder, a Barbados international business company (IBC). Both companies were members of a multinational corporate group of which the parent company was a Canadian public

corporation. The Trinidad Board of Inland Revenue (BIR) claimed that even though Methanex Trinidad declared and paid the dividends to Methanex Barbados, they were paid for the "ultimate and actual benefit" of the parent company, Methanex Canada. The BIR argued (successfully in each level of Court in Trinidad) that the dividends should be treated as artificial" and "fictitious", for purposes of the domestic anti-avoidance rule in section 67 of the *Income Tax Act* (Trinidad & Tobago), and subject to withholding tax as dividends paid to Methanex Canada rather than to Methanex Barbados.

The Privy Council unanimously found that the dividends were neither "artificial" nor "fictitious". The Privy Council also confirmed that the recipient of the dividends, an IBC, was liable to tax in Barbados, and therefore resident of Barbados for the purposes of the CARICOM Tax Treaty.

This decision clarifies the proper legal characterisation of normal commercial payments made within multinational corporate groups, including cross-border payments made in the context of international tax treaties. The decision also confirms the foundational principles for determining who is a "resident" of a particular jurisdiction for purposes of an international tax treaty, on the basis of being "liable to tax" in such jurisdiction.

Al Meghji, head of Osler's tax litigation practice, argued the appeal before the Judicial Committee of the Privy Council — the first appearance before that court by Canadian-based counsel in several decades. The Privy Council remains the highest court of appeal for many jurisdictions within the Commonwealth, as well as the United Kingdom's overseas territories and crown dependencies and is constituted predominantly by the Justices of the Supreme Court of the United Kingdom.

The Osler team representing Methanex in the appeal also included Edward Rowe, David Wilson, Emily Wang and international tax specialist Robert Raizenne, and was accompanied by Trinidad counsel Jonathan Walker and Miguel Vasquez of Hamel-Smith and Co.

Background to the appeal

The Dividends

The Methanex group of companies, of which Methanex Corporation (Methanex Canada) is the parent company, is a leading producer and supplier of methanol.

During the relevant period, Methanex Trinidad (Titan) Unlimited (Methanex Trinidad) was an unlimited liability company resident in Trinidad & Tobago that carried on operations in Trinidad. Its sole shareholder was Methanex Trinidad Holdings Ltd (Methanex Barbados), which was a Barbados company that was licensed as an "International Business Company" (IBC). Methanex Barbados was, in turn, wholly owned by a company incorporated in the Cayman Islands (Methanex Cayman), which was itself wholly owned by Methanex Canada.

In 2007, Methanex Trinidad paid four dividends totalling US$85.4 million to its sole shareholder, Methanex Barbados (referred to in the decision and in this Update as the Dividends). After having received each dividend, Methanex Barbados paid dividends in equal amounts to its own shareholder, Methanex Cayman. Together with dividends received from other subsidiaries, Methanex Cayman used the dividends received from Methanex Barbados to meet its operating expenses, service its debt obligations, undertake its investment activities and pay a substantial dividend to Methanex Canada.

The CARICOM Tax Treaty

Trinidad & Tobago and Barbados are members of the Caribbean Community (CARICOM) and

parties to the CARICOM Tax Treaty. Unlike most international tax treaties based on the OECD Model Tax Convention which are bilateral, the CARICOM Tax Treaty is a multilateral tax treaty among various member states of the CARICOM and is not based on the OECD Model Tax Convention.

Under Article 11 of the CARICOM Tax Treaty, dividends paid by a resident of one member state to a resident of another member state are not subject to withholding tax. No tax was withheld on the Dividends paid by Methanex Trinidad to Methanex Barbados, on the basis that the CARICOM Tax Treaty applied.

The assessment

The Trinidad & Tobago Board of Inland Revenue (BIR) assessed Methanex Trinidad in respect of the Dividends by levying withholding tax of 5%. The BIR relied on section 67 of the *Income Tax Act* (Trinidad & Tobago) and asserted that the Dividends were "artificial" and "fictitious" "insofar as they purported to be" dividends from Methanex Trinidad to Methanex Barbados. The BIR assessed on the basis that the dividends were "in substance" paid directly to Methanex Canada and therefore were subject to withholding tax at the rate of 5%, which would have applied under the Canada-Trinidad & Tobago Tax Treaty.

In the alternative, the BIR stated that the CARICOM Tax Treaty did not apply because the recipient of the Dividends, Methanex Barbados, was not a resident of Barbados for purposes of the CARICOM Tax Treaty. Specifically, the BIR argued that Methanex Barbados was not a resident of Barbados for purposes of the CARICOM Tax Treaty because it was not "liable to tax" in Barbados due to its status as an IBC, which entitled it to a lower rate of tax in Barbados than other corporations.

The courts below

The Tax Appeal Board (TAB) had concluded that Methanex Barbados was liable to tax in Barbados and therefore was resident in Barbados for purposes of the CARICOM Tax Treaty. However, the TAB also found that the Dividends were "artificial and fictitious" within the meaning of section 67, which entitled the BIR to effectively reallocate the Dividends to Methanex Canada and, on that basis, apply a 5% rate of withholding. The Court of Appeal upheld the decision of the TAB on both questions. Methanex Trinidad appealed to the Privy Council, which is the final court of appeal for Trinidad & Tobago.

Overturning the lower courts, Privy Council determines that the Dividends were neither 'artificial' nor 'fictitious'

The Privy Council reviewed the basis on which the courts below had concluded that the Dividends were both artificial and fictitious. The Privy Council began its review by observing that prior jurisprudence had established that each of these terms involves a separate analysis, with the test for "artificial" involving an examination of whether the impugned transaction(s) were "abnormal" and the test for "fictitious" involving an examination of whether the transactions were a "sham".

On the question whether the Dividends were "fictitious" (i.e., a sham), the courts below had emphasized that the Dividends were declared as part of a larger plan to transmit cash to Methanex Canada. The Privy Council, however, noted that the fact a payment is made by A to B with the intention that it should be paid by B to C does not render fictitious the payment from A to B.

This was particularly so where dividends are paid up a corporate chain with the intention that they should be received by the ultimate parent company, because an indirect subsidiary

cannot lawfully declare a dividend directly to its ultimate parent. Nor did the fact that Methanex Canada requested some of the Dividends make them fictitious or make Methanex Canada the beneficial owner of the Dividends.

The Privy Council commented that "[t]here is nothing unusual or surprising for the ultimate holding company of a group to require subsidiaries to pay some or all of their distributable reserves by way of dividend up the corporate chain." This was so even though Methanex Canada employees had signing authority over Methanex Barbados's bank account.

On the question of whether the Dividends were artificial, the Court of Appeal had relied on the fact that Methanex Barbados declared dividends at the request of Methanex Canada and "with rapidity" after it received the Dividends, in amounts equal to the Dividends.

The Privy Council disagreed that these facts rendered the Dividends artificial (i.e., abnormal). The Privy Council noted that because the payment of dividends up the corporate chain could *only* be achieved by declaring dividends to Methanex Barbados, to be followed by similar dividends up the corporate chain, "[i]t cannot be 'artificial' to execute a legitimate commercial decision by the only available legal means."

The Privy Council observed that "[f]ar from being abnormal, the payment of dividends up a corporate chain at the request of the ultimate holding company is a commercial commonplace in national and international groups, not least because it is the only lawful means by which distributable profits can be brought up from subsidiaries."

Methanex Barbados, an IBC, was 'liable to tax' in Barbados and therefore resident in Barbados for purposes of the CARICOM Tax Treaty

While the CARICOM Tax Treaty differs in several material ways from the OECD Model Convention, the definition of a "resident" in the CARICOM Tax Treaty is substantially identical to the OECD Model Convention and most international tax treaties.

The BIR raised a number of arguments before the Privy Council as to why Methanex Barbados should not be considered a "resident" of Barbados for purposes of the CARICOM Tax Treaty, most of which revolved around Methanex Barbados's status as an IBC. Under the *International Business Companies Act*, certain resident corporations of Barbados could apply for a license as an IBC, which afforded certain advantages including a lower rate of tax than applied to other Barbados-resident corporations.

The Privy Council held that a Barbados IBC is resident of Barbados for the purposes of the CARICOM Tax Treaty.

First, the Privy Council affirmed the Supreme Court of Canada's statement in *Alta Energy* that treaties must be interpreted in their entire context and with a view to implementing the true intentions of the parties. The Privy Council rejected the BIR argument that Methanex Barbados was not liable to tax in Barbados "by reason of" residence but instead by reason of being licensed as an IBC. The Privy Council pointed out that to be granted a licence as an IBC, Methanex Barbados had to be resident in Barbados and that it was not disputed that Methanex Barbados was a resident of Barbados as a matter of domestic Barbadian law.

Second, the Privy Council adopted the reasoning in the Supreme Court of Canada's 1995 decision in *Crown Forest*. *Crown Forest* held that a corporation is a resident in a jurisdiction if it is "liable to tax" on its worldwide income in that jurisdiction — i.e., if the jurisdiction asserts the right to impose tax on worldwide income. Methanex Barbados was "liable to tax" in Barbados on its worldwide income, albeit at a lower rate. Irrespective of the rate at which tax was charged, Barbados asserted jurisdiction to impose tax on the worldwide income of

Methanex Barbados.

The BIR purported to rely on *Crown Forest* for the proposition that to qualify as a person "liable to tax", the person must be liable at the "full" rate applicable generally and not at a substantially reduced rate. The Privy Council rejected the BIR's argument on this point and this interpretation of the *Crown Forest* decision. Nothing in *Crown Forest* suggested that "full tax liability" meant anything more than that the country in question asserted the right to tax a person on its worldwide income. In particular, there was nothing to suggest that it meant liability at the top rate of tax imposed in a jurisdiction.

The Privy Council also cited with approval the majority opinion in *Alta Energy*, in which Côté J. clarified that the "liable to tax" requirement "is not concerned with whether the person claiming benefits is in fact subject to taxation. Being liable to tax is better understood as being 'liable to be liable to tax', meaning that taxes are a possibility, regardless of whether the person actually pays any".

Finally, the Privy Council rejected the BIR's argument that residence in the CARICOM Tax Treaty must be interpreted purposively so as to restrict its application. In particular, the BIR asserted that the CARICOM Tax Treaty was only meant to benefit true residents of CARICOM states (as opposed to residents of other states with holding companies in the region) and also not meant to benefit IBCs.

The Privy Council rejected these propositions as they would involve implying terms into the CARICOM Tax Treaty that were not there. Specifically, according to the Privy Council, there was "no hint" that any such restriction was intended by the CARICOM member states. Furthermore, if there was any intention to exclude IBCs this could have been done expressly, as was done in other tax treaties.

Implications and takeaways

The decision of the Privy Council emphasizes the importance of the proper legal characterisation of normal commercial payments and transactions occurring within a corporate group, as well as the interaction between such legal characterisation and the application of tax treaties. In particular, the Privy Council rejected that the so-called "substance" of the transactions in this case was any different than what the transactions were as a matter of law. Because the payments were neither "artificial" nor "fictitious", the tax authority was required to apply the CARICOM Tax Treaty to the transactions as it found them and was not entitled to recast the transactions as something other than what they were at law.

The Privy Council's decision is also an important precedent in relation to the principles of interpretation applicable to international tax treaties.

First, the decision confirms the proper interpretation of the "liable to tax" test under the residence clause contained in most international tax treaties, affirming the decisions of the Supreme Court of Canada in *Crown Forest* and *Alta Energy* to the effect that "[b]eing liable to tax is better understood as being 'liable to be liable to tax'". This is an important distinction which ensures that jurisdictions are entitled to extend tax preferences (such as rate reductions) to certain types of taxpayers without causing such taxpayers to cease being "residents" for purposes of that jurisdiction's tax treaties.

Finally, the Privy Council's decision affirms that the broad and liberal construction generally applicable to treaties does not permit courts to read implied terms or restrictions into tax treaties where there is no evidence that such terms or restrictions were actually intended by the contracting states.

If you have any questions or require additional analysis on the Privy Council's decision in *Methanex*, please contact any member of our National Tax Department.